MAR 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jefferson de R. Capps, Esq.
3446 Fifth Avenue North
St. Petersburg, FL 33713
Counsel for Respondent, MARY JONES

INDEX

Page

ADOPTION OF PETITIONERS' STATEMENTS AS TO OPINIONS BELOW, JURISDICTION, QUESTIONS PRESENTED, STATUTES INVOLVED AND STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 2

I. To Resolve Conflict Between Federal Court of Appeals and Applicable Decisions of Supreme Court as Applied by Numerous State Courts of Appeals and Lower Federal Court 2

II. To Insure Proper Administration of Longshoremen's Act 4

III. To Decide an Important Federal Question 6

CONCLUSION 9

CITATIONS

Page

Cases:

Addison v. Bulk Food Carriers, Inc.,
489 F.2d 1041 (1st Cir. 1974) 6, 7

Ahmed's Case, 278 Mass. 180, 179 N.E.
684 (1932) 4, 5

Bell v. Isthmian Lines, Inc., 363 F. Supp.
156 (M.D. Fla. 1973) 7, 8

Bradley v. Richmond School Board,
___U.S.___, 94 S. Ct. 2006,
40 L.Ed.2d 476 (1974) 4, 5

Casieri's Case,
190 N.E. 118 (Mass. Sup. Jud. Ct. 1934) 6

Claridge Apartments Co. v. Commissioner of Internal Revenue,
323 U.S. 141 (1944) 6

Dillingham Corporation v. Massey,
505 F. 2d 1126 (9th Cir. 1974) 4, 7

Ettor v. City of Tacoma,
228 U.S. 148 (1913) 8

Greene v. United States,
376 U.S. 149 (1964) 6

Hardware Mut. Casualty Co. v. Carlton,
151 Fla. 238, 9 So.2d 359 (1942) 2, 3, 4, 7

Page

Hecht v. Parkinson,
70 So.2d 505 (Fla. S. Ct. 1954) 3

Hyatt v. Armstrong Cork Co.,
121 So. 2d 793 (Fla. S. Ct. 1960) 3

Liberato v. Royer,
270 U.S. 535 (1926) 3

Overseas African Construction Corp. v. McMullen,
500 F.2d 1291 (2d Cir. 1974) 4

Penrose v. Commercial Travelers Co.,
275 P.2d 969 (Id. S. Ct. 1954) 3

Phillips v. City of West Palm Beach,
70 So.2d 345 (Fla. S. Ct. 1954) 3

Sampeyreac v. United States,
32 U.S. (7 Pet.) 222 (1833) 4, 5, 8

Stancil v. United States,
200 F. Supp. 36 (E.D. Va. 1961) 7, 8

Statutes:

33 U.S.C. §928 (as amended 10/27/72) 5

Page

Miscellaneous:

A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §83.12, 83.17 (1973) 5

20 Am.Jur.2d, *Costs* §7 4

20 C.J.S., *Costs* §3b 4

99 C.J.S., *Workmen's Compensation* §21, p. 130 n. 97 4

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972) 7

3 U.S. Code Cong. & Adm. News '72, 4706 & 4717 7

Virginia Hotel Co. v. Mills, BRB No. 133– 73 (Ben. Rev. Bd. Apr. 2, 1974) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1015

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,

Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, Mary Jones, as guardian of the incompetent claimant, Charles E. Jones, files this brief in opposition to the petition of Intercounty Construction Corp. and Hartford Accident & Indemnity Company praying for a Writ of Certiorari to be issued for the review of the order for

attorney's fees to Respondent's attorney pursuant to the judgment entered in the United States Court of Appeals for the District of Columbia entered on January 16, 1975.

Respondent adopts Petitioners' statement of the opinions below, jurisdiction, questions presented, statutes and provisions of the United States Constitution involved, with reference to the Longshoremen's and Harbor Workers' Compensation Act merely being by section number and reference to the "Act," and statement of the case.

REASONS FOR NOT GRANTING THE WRIT

There is no need for the Court to exercise its discretion to issue its Writ of Certiorari to review the issue of attorney's fees, and this because the specific reasons cited by Petitioners as to why the Writ should issue are misplaced.

I. TO RESOLVE CONFLICT BETWEEN FEDERAL COURT OF APPEALS AND APPLICABLE DECISIONS OF SUPREME COURT AS APPLIED BY NUMEROUS STATE COURTS OF APPEALS AND LOWER FEDERAL COURT.

As to all of the cases cited by Petitioners, with the exception of *Hardware Mut. Casualty Co. v. Carlton,* 151 Fla. 238, 9 So.2d 359 (1942), there is no conflict in the application of Supreme Court and Federal Court decisions as applied by state and federal courts on the issue, that is, the granting of attorney's fees under a statutory amendment where the cause of action arose prior to the amendment. The *Carlton* case is the only case cited by Petitioners on the issue; analysis of the remainder of the cases shows that they are not on point.

First, as to the Florida Supreme Court decisions: The *Carlton* case, *supra,* stated that the parties' acceptance of Florida's Workmen's Compensation Act constituted a contract embracing the provisions of the act then in effect on the date of injury. This is a statement of the general rule (but a minority view as to attorney's fees not being allowable). Reliance by the Florida Court on *Liberato v. Royer,* 270 U.S. 535 (1926), was proper as to the act creating vested contract rights as of the date of injury. The additional Florida Supreme Court cases had nothing to do with the attorney fee point in issue here. Both *Phillips v. City of West Palm Beach,* 70 So.2d 345 (Fla.S.Ct. 1954), and *Hyatt v. Armstrong Cork Co.,* 121 So.2d 793 (Fla.S.Ct. 1960), had as an issue whether increased compensation under an amendment to the act could be retroactively applied to an injury before the amendment. *Hecht v. Parkinson,* 70 So.2d 505 (Fla.S.Ct. 1954), was as to the same point as in the *Phillips* and *Hyatt* cases, but was in specific reference to a scheduled injury. All, *Phillips, Hyatt* and *Hecht* held to the general rule that the act was a contract vesting rights and liabilities as to compensation as of the date of injury. All of the other cases cited by Petitioners as a conflict are not in conflict as to the point of attorney's fees, but rather are in support of the general rule as to the vested contract rights and liabilities to compensation as in the *Phillips, Hyatt* and *Hecht* cases.

What then of *Carlton, supra?* The issue is whether the matter of attorney's fees is determined to be a remedial, procedural or curative statutory provision, or whether it is determined to be substantive. The *Carlton* case, *supra,* is the only case cited by Petitioners that such an amendment is as to a substantive right. Actually, the Florida Supreme Court's determination is the minority view that such an amendment impairs vested contract rights. See *Penrose v. Commercial Travelers Insurance Co.,* 275 P.2d 969, 976-978 (Id. S.Ct.

1954), where, though the majority adhered to the minority view as in *Carlton, supra,* the majority and minority views on the point in issue here are discussed and citations provided. Under the majority view, application of a statutory amendment allowing attorney's fees to a cause of action occurring prior to the amendment is held to be constitutional, and retrospective in its application, as the change is determined to be remedial and to affect procedure, not vested contract rights. For statements of this general rule, see 20 Am.Jur. 2d, *Costs* §7; 20 C.J.S., *Costs* §3b; and, 99 C.J.S., *Workmen's Compensation* §21, page 130n.97.

There is no showing that the federal courts are in conflict in applying the 1972 amendment to the Act authorizing attorney's fees as to a claim arising prior to the amendment. See *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291 (2d Cir. 1974), and *Dillingham Corporation v. Massey,* 505 F.2d 1126 (9th Cir. 1974), and supporting authorities for basis and reasoning, *Sampeyreac v. United States,* 32 U.S.(7 Pet.)222, 238 (1833), *Ahmed's Case,* 278 Mass. 180, 179 N.E. 684 (1932); cf. *Bradley v. Richmond School Board,* __U.S.__, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Indeed, there is also no showing that there is any conflict as to the precise issue as to any decisions of the Benefits Review Board under the 1972 amendment to the Act.

II. TO INSURE PROPER ADMINISTRATION OF LONGSHOREMEN'S ACT.

Petitioners suggest that the *Overseas* and *Dillingham* cases, *supra,* are distinguishable in that the constitutional issues were not directly raised, or because any pronouncement thereon could be construed as *dicta.* In *Overseas,* at 500 F.2d 1291, 1297, the court stated:

> "... The only serious dispute involving §928(a) is whether, as a statutory matter, Congress intended that section to apply to cases pending in any forum on November 26, 1972 (the effective date of the amendments), and, if so, whether there be any constitutional impediment to such an application. These questions need not detain us long...."

The court then, on the constitutional issue, went on to endorse the decision of the Benefits Review Board in *Virginia Hotel Co. v. Mills*, BRB No. 133-73 (Ben. Rev. Bd. Apr. 2, 1974) (Petitioners' Petition, App. 54-63), that the granting of attorney's fees under the amendment to the Act was not unconstitutional. The court in so holding relied on *Sampeyreac, supra,* for the proposition that a legislative act could be retrospectively applied to a cause of action that existed prior to the effective date of the act; and, on *Ahmed's Case, supra,* for the propositions that the statutory assessment of attorney's fees as costs to the successful claimant, but not to the employer/insurance carrier, was not unconstitutional because applied to pending and future cases, was not a deprivation of equal protection of the laws, nor a deprivation of property without due process of law. Comparison was made to the Supreme Court case of *Bradley, supra,* for the proposition that attorney's fees could be awarded for services performed as to a pending cause before the authorizing act in question had been enacted. Reference was then made to A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §83.12, 83.17(1973), as to approaches in providing attorney's fees in workmen compensation cases, and as to the commission or court supervision of the award of attorney's fees. Particular note should be made of the recommendation of the Council of State Governments recommended draft provision for attorney's fees appearing in §83.17, pages 354.61-354.62–the 1972 amendment to §928 of the Act here in question will be seen to be similar to the recommendation. Suffice it to say, the consideration of constitutional issues was more than *dictum.*

Petitioners state there are many pending cases prior to the 1972 amendment to the Act as to which attorney's fees may be awarded. This is as it should be and is not an unconstitutional application of the amendment as already shown—this is the intent and purpose of remedial and procedural legislation. But Petitioners say, cases previously considered as closed could be revived, and then the question of attorney's fees presented here would occur. Petitioners are crying, "Wolf"—there is no showing that this is occurring or has occurred. But, if it should occur, there is good authority that an amendment cannot apply to a workmen's compensation claim that is in fact closed, the right to review and appeal having expired. See *Casieri's Case*, 190 N.E.118 (Mass. Sup. Jud. Ct. 1934), for a case in point, and *Claridge Apartments Company v. Commissioner of Internal Revenue*, 323 U.S. 141, 164-165 (1944), and *Greene v. United States*, 376 U.S. 149, 160 (1964), for the propositions that legislative amendments are not to apply to issues closed and not pending, and that a retroactive effect will not be given to legislation that interferes with antecedent rights unless this is the unequivocable and manifest intent of the legislature.

III. TO DECIDE AN IMPORTANT FEDERAL QUESTION.

Petitioners' point here is a re-argument of their Reason I. There is nothing to show that the 1972 amendment to the Act is not being properly administered, and the Supreme Court cases of *Claridge* and *Greene, supra,* are not in point. *Claridge* stands for the proposition that a legislative act is not to apply to an issue closed and not pending (application is permissible if the issue is pending). *Greene* stands for the proposition that a retroactive effect will not be given to legislation that interferes with antecedent rights. The proscription in *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974), has nothing to do with the application of a

statutory amendment for attorney's fees to pending causes– this case stands for the proposition that the statutes at the time of injury governed as to the statutory causes of action then allowed, and that the amendment of the Longshoremen's and Harbor Workers' Act subsequent to the injury would not be allowed to interfere with the rights and liabilities of these causes of action as existed on the date of the injury. *Bell v. Isthmian Lines, Inc.*, 363 F. Supp. 156 (M.D. Fla. 1973), is to the same effect as *Addison.* Neither case is on point as to the remedial and procedural status of the award of attorney's fees. Neither is Petitioners' reference to the House of Representatives Report No. 92-1441, 92d Cong. 2d Sess. (1972) (118 Cong. Rec. 4698-4699 (1972)), on point as to the purpose and background of the 1972 amendment to the Act. It is on point to see that the Committee on Education and Labor, in stating its purpose and background, and in its description of the amendment to allow attorney's fees, did not proscribe its retroactive application. 3 U.S. Code Cong. & Adm. News '72, 4706 & 4747.

On the point in issue and in fact, the Federal Courts are applying to 1972 amendment to the Act properly, see the *Overseas* and *Dillingham* cases, *supra.* This is pursuant to established federal law. See *Stancil v. United States,* 200 F. Supp. 36 (E.D. Va. 1961), where claimant's pending suit was commenced under the Federal Tort Claims Act prior to amendment of the Virginia Workmen's Compensation Act, claimant's attorney was entitled to a pro-rata attorney's fee for recovery of the carrier's subrogated portion of the recovery though the amendment was subsequent to suit being brought, and prior to the amendment claimant's attorney was not entitled to a pro-rata attorney's fee. *Stancil,* at 200 F.2d 36, 45-46, has a discussion of the majority view, and the minority view of the Florida Supreme Court *Carlton* case, *supra,* in the retroactive application of attorney's fees to

pending causes. In discussion of the majority view, the court enunciates the distinction to be made between substantive rights, and matters of remedy and procedure here, see *Stancil*, page 46:

> "While the 'right' to institute an action against a third party may accrue to the employer as of the date of the injury, the method and manner of obtaining such recovery constitutes only a procedural right, or at best, a right affecting merely a form of remedy. For these reasons the 1960 amendment manifestly touched upon the rights of the carrier as to all cases pending when the amendment became effective. . . . "

This the distinction drawn in *Ettor v. City of Tacoma*, 228 U.S. 148, 154-155 (1913): statutes as to remedy relate to the course and mode of procedure to enforce a substantive right and are subject to change, alteration and repeal so long as a contract is not impaired or a vested property right is not deprived; in *Sampeyreac, supra*, at 32 U.S. (7 Pet.) 222, 239: legislation providing a remedy only has retrospective operation though, indeed, it may affect and operate upon causes of action existing at the time it is passed; and, in *Bell, supra*, at 363 F.Supp. 156, 159: due to sometimes harsh effect of retroactivity, statutes affecting substantial rights are invariably given prospective application, laws relating to procedure are given more liberal court interpretation and are sometimes applied retroactively, and a distinction is drawn between "curative" statutes which by their design are necessarily retroactive in application, and "amendatory" acts which create or abrogate claims for relief or substantive rights and are usually afforded prospective application.

It is submitted that Petitioners' authorities are not correct for the proposition that, as to attorney's fees, the right thereto can only vest as to claims arising subsequent to the 1972 amendment of the Act. The 1972 amendment as to

attorney's fees is being constitutionally applied, and there is no need for this Court to exercise its discretion to endorse this salutary application.

CONCLUSION

For the reasons set forth, it is respectfully suggested that the petition for Writ of Certiorari as to this issue should not be granted.

Dated: 10 March 1975.

JEFFERSON de R. CAPPS, Esq.
3446 Fifth Avenue North
St. Petersburg, Florida 33713
Attorney for Respondent, MARY JONES